IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, etc.,

Respondent.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, SAMUEL M. LEVY, respectfully petitions for a rehearing of the denial on November 26, 1951 of his petition for writ of certiorari to the United States Court of Appeals for the Second Circuit.

POINT I

It was not previously argued that defendant has never been found guilty of fraud and that the Court below expressly rejected any such finding.

Respondent in his brief made the contention, not contained in the opinion of the Court below, that in New York breach of a fiduciary duty is fraud, citing the

Emmerich case, 300 N. Y. 417. Petitioner's counsel truly believes that the only reason this Court might have denied certiorari was the conviction that the *Emmerich* case did stand for the cited proposition, not previously dealt with in petitioner's brief for the reason that the Court below had not dealt with this aspect of the problem.

But the *Emmerich* case has no relevance whatsoever to the situation here at bar.

The *Emmerich* case merely stands for the proposition that a complaint couched in terms of fraud, unlike the complaint at bar, against a particular *express* trustee, may be held to be an action for fraud. But defendant here is not an express trustee, nor was the complaint couched in terms of fraud. Indeed, one of the cases on which the Court relied in *Emmerich* (300 N. Y. at 420) expressly held that when an express trustee, without suspicion of wrong, took excessive commissions in good faith, the statute of limitations began to run against him as soon as he was no longer an express trustee, though he was then a constructive trustee. Such action, remarkably similar to defendant's action here, did *not* constitute fraud, held the court. When a person is not an express trustee, as in the case at bar, "the running of the statute begins, and only actual or intentional fraud will be effective to suspend it." *Spallholz* v. *Sheldon,* 216 N. Y. 205, 209, and see cases cited at pp. 208-209 *ibid.* The New York Court of Appeals has consistently held, in addition, that those who were fiduciaries to a corporation could not be sued in fraud for misappropriation of corporate assets, even where the plaintiffs are trustees in bankruptcy. *Clarke* v. *Mayer,* 295 N. Y. 830 (1946); *Hastings* v. *Byllesby & Co. (Haystone),* 293 N. Y. 404 (1944); *American Cities Power & Light Corp.* v. *Williams,* 74 N. Y. S. 2d 369 (Sup. Ct. 1947), unan. affd. 80 N. Y. S. 2d 357

(1st Dept., 1948), leave to appeal denied, 298 N. Y. 931 (1948). For a review of earlier cases, see *Shultz* v. *Manufacturers & Traders Trust Co.,* 128 F. (2d) 889 (C.C.A. 2d, 1942), cert. den. 317 U. S. 674.

POINT II

Respondent's brief affirmatively demonstrated the broad and erroneous scope of the decision below.

Respondent's brief (p. 6) reads as follows:

> "Fraud, of course, is a word capable of very broad meaning. As stated in *Connolly* v. *Gishwiller* (7 C. A. 1947), 162 F. 2d 428, cert. denied 332 U. S. 825 (p. 433):
>
> > 'Fraud, in its general sense, comprises all acts, omissions and concealments, involving a breach of legal or equitable duty, trust or confidence and resulting in damage to another.'
>
> " 'Fraud', as used in *Bailey* v. *Glover* [21 Wall. 343 (1874)], is obviously used in a broad and generic sense and not in the narrower sense of deceit."

Surely this "general sense" definition of fraud, used in a case having no connection with a limitations problem, was never intended to be a basis for the suspension of the running of the statute of limitations. Under the doctrine of the *Connolly* case, *every* cause of action—since there is no cause of action which does not fit within this definition—could be considered an action for fraud which would suspend the running of the statute. The decision below narrows such doctrine only to the extent that trustees are the only ones who can take advantage of it (R. 91), a distinction without any rational basis. Surely this Court never intended the *Bailey* case to go that far.

The rule of *Bailey* has nowhere been more accurately stated than in respondent's brief, page 5, when he states it as being "that where there has been no negligence or laches on the part of a plaintiff in coming to the knowledge *of the fraud which is the foundation of the suit,* and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him, and that that is so although the party committing the fraud has made no special effort to conceal it." (Emphasis supplied.) Petitioner's point is simply that fraud is *not* the foundation of the suit here. As respondent himself states in his brief, page 4, the claim in this case is "* * * one for money had and received * * * sounding in contract". Such a claim cannot be brought within the doctrine of *Bailey.*

This Court has held that in such a case the statute does begin to run at once. *Avery* v. *Cleary,* 132 U. S. 604. Therefore the decision below was in conflict with *Avery* v. *Cleary.*

CONCLUSION

This petition for a rehearing should be granted and the petition for a writ of certiorari should be granted.

Dated: New York, N. Y., December 6, 1951.

Respectfully submitted,

HERBERT MONTE LEVY,
Attorney for Petitioner.

Certificate of Counsel

HERBERT MONTE LEVY, attorney and counsel for petitioner, hereby certifies that the above petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds set forth in Rule 33(2) of this Court, i.e., "substantial grounds available to petitioner although not previously presented".

HERBERT MONTE LEVY,
Attorney for Petitioner.

Office-Supreme Court, U.S.
FILED
DEC 15 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,

Respondent.

RESPONSE TO PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HAROLD HARPER,
Counsel for Respondent.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,
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vs.

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,
Respondent.

RESPONSE TO PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner says that there should be a rehearing upon his petition because in his original brief he had not dealt with the proposition that in New York breach of a fiduciary duty is fraud. He says that this omission was due to the fact that the Court below had not dealt with this aspect of the problem.

It is true that in petitioner's original brief he seemed strangely unaware of the fact that faithlessness to a fiduciary duty might constitute fraud. It is far from true, however, that the Court below had not dealt with this aspect of the problem. The Court said [92] "Could there be a more baseless appropriation of the *res* by constructive trustees?" And in interpreting this Court's decision in

Holmberg v. *Armbrecht* (1946) 327 U. S. 392, the Court below said [92]:

> "This we take to mean that in cases of 'fraud,' *used to include at least instances of the kind at bar,* when Congress does not choose expressly to say the contrary, the period of limitation set by it only begins to run after the injured party has 'discovered, or has failed in reasonable diligence to discover' the wrong." (Emphasis ours.)

And again [93]:

> "Indeed it would be monstrous if so bare-faced a taking of this corporation's funds as is here displayed were to escape restitution because the confederates had succeeded in keeping the transaction from detection for six years."

Hence, the Court below expressly held that a breach of fiduciary duty, whether in New York or elsewhere, not only constituted fraud, but constituted fraud within the meaning of *Bailey* v. *Glover* as that case had been interpreted by subsequent decisions of this Court. This holding was open to attack upon petitioner's original application for the writ, and it was petitioner's own choice to gloss it over.

The decision in *Emmerich* v. *City Bank Farmers Trust Company* (1950) 300 N. Y. 417, was not based upon any theory of the continuing liability of an express trustee. It was specifically based upon the New York Civil Practice Act, § 48, subd. 5,* which embodies in a statute substantially

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* "§ 48. ACTIONS TO BE COMMENCED WITHIN SIX YEARS.
"The following actions must be commenced within six years after the cause of action has accrued:

* * * * * * * * *

"5. An action to procure a judgment on the ground of fraud. The cause of action in such a case is not deemed to have accrued until the discovery by the plaintiff, or the person under whom he claims, of the facts constituting the fraud.

* * * * * * * * *"

the same chancery rule* adopted judicially for the federal courts in *Bailey* v. *Glover*. The Court below [90] did not find it necessary to decide whether this case fell within that statute, which also would have had the effect of suspending the running of the statute of limitations until the discovery of the facts. The *Emmerich* case was cited by respondent simply for the proposition that a breach of fiduciary duty may constitute fraud when that term is used in the broad sense that must have been contemplated in *Bailey* v. *Glover*. Surely an express trustee is not the only kind of fiduciary who may be guilty of fraud. Respondent does not question that, had the fraud not been concealed, the statute of limitations would have begun to run when petitioner became a constructive trustee of the corporation's funds. The fraud, however, was concealed, and thus *Bailey* v. *Glover* applies.

The petition for rehearing of denial of a writ of certiorari should be denied.

Dated, New York, N. Y., December 12, 1951.

Respectfully submitted,

HAROLD HARPER,
Counsel for Respondent.

* The New York statute originally applied only to equitable causes. For its evolution see 2 N. Y. Rev. Stat. (1829) 301, § 51; Code of Remedial Justice (1876) § 382; New York Code of Civil Procedure (1920) § 382.

DEC 15
CHARLES

IN THE

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against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,

Respondent.

PETITIONER'S REPLY BRIEF, AND REQUEST FOR ADDITIONAL RELIEF, ON PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT MONTE LEVY,
Attorney for Petitioner,
170 Fifth Avenue,
New York 10, N. Y.

Dated: New York, N. Y., December 14, 1951.

APPEAL PRINTING CO., INC., 130 CEDAR STREET, NEW YORK, WO 4-3033

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 377

SAMUEL M. LEVY,

Petitioner,

against

LEWIS M. DABNEY, JR., as Trustee of Associated Gas and Electric Company, Debtor, in a Proceeding for Corporate Reorganization under Chapter X of the Bankruptcy Act,

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PETITIONER'S REPLY BRIEF, AND REQUEST FOR ADDITIONAL RELIEF, ON PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner takes the unusual course of filing a reply brief on this petition for rehearing* because Respondent in his answering brief conceded the sole point at issue, and

* It is not clear whether a motion is necessary to permit the filing of this brief. If such a motion be necessary, Petitioner requests this Court to consider this brief as such a motion, based upon a concession newly made by Respondent which could not have been known to Petitioner before his receipt of Respondent's brief.

thereby demonstrated that certiorari should be granted and the judgment below reversed without further hearings.

Respondent conceded as follows:

> "*Respondent does not question that, had the fraud not been concealed, the statute of limitations would have begun to run when petitioner became a constructive trustee of the funds* [1938]. The fraud, however, was concealed, and thus *Bailey* v. *Glover* applies." (Emphasis supplied.) Response to Petition for Rehearing, p. 3.

Since no evidence was introduced to show concealment, and since the Court below expressly found that there had been no concealment,** the Respondent has conceded that the two year statute of limitations began to run in 1938 when defendant's receipt of the moneys made him a constructive trustee. Suit here was not brought until 1948. The action seems clearly barred.

This concession disposes of the case. Petitioner asks that certiorari be granted and the judgment below be summarily reversed because of this Court's decision in *Johnson* v. *Dye*, No. 332, October Term 1949. No brief opposing the granting of certiorari in that case having been filed, this Court granted certiorari and, apparently acting on the basis of this concession, immediately reversed the judgment below. 338 U. S. 864. The Court refused to grant a rehearing even when this concession was explained (Petition for Rehearing, Affidavit of Herbert M. Levy, Exhibit A). 338 U. S. 896. If Johnson's con-

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** In comparing the instant case with *Bailey* v. *Glover*, the Court below noted [91]:

> "* * * in each the defendant had done nothing to cover up his guilt * * *".

cession there enabled this Court to reverse without further hearing, surely Respondent's express concession here should enable this Court to reverse without further hearing.

The petition for rehearing of denial of a writ of certiorari should be granted and the judgment below summarily reversed.

Dated: New York, N. Y., December 14, 1951.

Respectfully submitted,

HERBERT MONTE LEVY,
Attorney for Petitioner.